No. 01-1229

Supreme Court, U.S.
FILED
AUG 9 2002
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In The
Supreme Court of the United States

PIERCE COUNTY, a municipal corporation,

Petitioner,

vs.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION IN SUPPORT OF RESPONDENTS

DEBRA L. STEPHENS*
6210 E. Lincoln Lane
Spokane, WA 99217
(509) 465-5702
**Counsel Of Record*

GREGG L. TINKER
101 Stewart Street,
Ste. 1010
Seattle, WA 98101
(206) 447-9640

BRYAN P. HARNETIAUX
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890

GARY N. BLOOM
P.O. Box 1461
Spokane, WA 99210
(509) 624-4727

Date: August 9, 2002

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation has an interest in the rights of injured persons seeking legal redress, including rights affected by interpretation and application of federal statutes limiting discovery or admissibility of evidence in state court proceedings. WSTLA Foundation appeared as amicus curiae in this case before the Washington Supreme Court. Letters from both parties and the United States granting consent to the filing of this amicus curiae brief are on file with the Court.[1]

INTRODUCTION AND STATEMENT OF THE CASE

The issues before the Court involve the preemptive scope of 23 U.S.C. §409 and the constitutionality of its 1995 amendment. This case arises out of a motor vehicle accident occurring at an intersection maintained by Petitioner Pierce County (or "the County"). Respondent

[1] Pursuant to Rule 37.6, amicus curiae WSTLA Foundation discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief, *except that* WSTLA funds the amicus program operated by WSTLA Foundation, and the Spokane, Washington law firms of Winston & Cashatt, P.S. and Delay, Curran, Thompson, Pontarolo & Walker, P.S., donate certain clerical services and materials for operation of the program, including services and materials used in preparation of this brief.

Ignacio Guillen et al. (Guillen) contends that the County failed to erect proper traffic controls at the intersection in question. *Guillen v. Pierce County*, 982 P.2d 123, 127 (Wash. App. 1999), *aff'd on other grounds*, 31 P.3d 628 (Wash. 2001).

In two separate proceedings, one a statutory action seeking public records and the other a common law tort action, Guillen sought information and materials about the accident history of the intersection, particularly accident reports. The County urged that such data and reports were privileged under 23 U.S.C. §409 because they were compiled or collected for the purpose of a highway hazard elimination program governed by 23 U.S.C. §152.

The trial court in each action ordered the County to produce certain information and materials. *Guillen*, 982 P.2d at 126-27. On review, the Washington court of appeals affirmed for the most part, concluding that none of the information and materials requested, except one document, were compiled or collected for §152 purposes, and thus were not subject to §409. *Id.* at 130.

The County sought review in the Washington Supreme Court of those portions of the court of appeals' opinion adverse to it, also renewing a claim, not addressed by the court of appeals, that the accident reports at issue were not subject to disclosure or discovery under state law. *Guillen*, 31 P.3d at 633-35, 637. The Washington Supreme Court accepted review.

The Washington Supreme Court held that the accident reports and certain accident history sought by Guillen were generally discoverable under state law. *Id.* at 637-40 & ns. 7-8. A 5-justice majority of the court found the otherwise discoverable information and materials

subject to the §409 privilege, concluding that the 1995 amendment, adding the "or collected" language, was intended to sweep broadly and protect information and materials regardless of their source or location, and regardless of whether they were also collected for non-§152 purposes. *Id.* at 640-46. The majority rejected the notion, pivotal to the court of appeals analysis, that each source must be analyzed separately under §409, with only those state agencies collecting information and materials for §152 purposes allowed to assert the claim of privilege. *Id.* at 645-46. The court found this approach "unsound and unworkable given the fact that such legal distinctions are already being rendered meaningless by the electronic revolution underway." *Id.* at 646.

Having expansively interpreted the 1995 amendment to §409, the majority court proceeded to find the amendment an unauthorized intrusion on state sovereignty. It concluded:

> Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and 'raw data' created and held by state and local governments and essential to the proper adjudication of claims brought under state and local law, simply because such collections *also* serve federal purposes.

Id. at 655. The majority found the 1995 amendment unjustified under the Spending Clause, Commerce Clause or Necessary and Proper Clause of the United States Constitution. *See* U.S. Const. Art. I §8, Cls. 1, 3, 18. It

remanded for determination of what information and materials were compiled for §152 purposes. *Id.* at 656.

A 3-justice concurrence of the Washington Supreme Court narrowly construed the 1995 amendment to §409, limiting its reach to only those state sources that generate §152 work product. *Id.* at 656-59 (Madsen J., concurring). It found this approach resolved the constitutional infirmity recognized by the majority under its expansive view of the 1995 amendment.

This amicus brief urges a narrow construction of §409, as amended in 1995, consistent with its text and purpose. The proposed construction fully resolves the constitutional issues before this Court, as Guillen does not appear to challenge application of §409 to information and materials compiled or collected solely for §152 purposes. *See* Guillen Br. in Opp. to Cert. at 1, 15 n.5, 18-19.

ISSUE PRESENTED

What is the proper interpretation of 23 U.S.C. §409?

SUMMARY OF ARGUMENT

23 U.S.C. §409 establishes a narrow privilege designed by Congress to prevent states from being disadvantaged in tort litigation because of information gathering and reporting activities required as a condition for receiving federal funds. §409 exempts from discovery or admission into evidence only information and materials that would not exist but for a state's participation in federal highway safety programs, *i.e.*, that which is compiled or

collected *solely* for the purpose of federal highway safety enhancement pursuant to 23 U.S.C. §152 (or for the other specified statutory purposes). The §409 privilege should be so limited to avoid the "silver platter" effect that would otherwise obtain as to work product generated by reason of a state's participation in federal highway safety programs.

Under this interpretation, §409 is in the nature of a work product privilege that protects information and materials "compiled" for §152 purposes in the formal or bound reports, surveys, schedules, etc. required under this section, as well as those "collected" for such purposes, when not embodied in §152 compilations. It does not shelter information and materials generated for other purposes, even if those purposes coincide with or overlap §152 purposes. Nor are information and materials initially compiled or collected for state purposes "federalized" when later compiled or collected for §152 purposes. It is the purpose for which the information and materials are gathered that is determinative, not whether the particular agency or source from which the plaintiff seeks discovery is involved in §152 activity.

This narrow purpose-based reading of §409 is compelled by the text and rationale of the statute, consistent with both federal preemption analysis and the strict construction given to evidentiary privileges. A broader interpretation far exceeds §409's limited design, and renders Washington tort victims worse off in pursuing long-standing state remedies, by sheltering accident history that otherwise exists irrespective of Washington's participation in federal highway safety programs. It also raises serious doubts as to the constitutionality of the

statute, a question addressed in other briefing before the Court.

With respect to the United States' argument regarding the gathering of information and materials in a single electronic database, used for both federal and state purposes, §409 does not shelter the entire database. The burden remains on the party asserting §409's protection to specifically identify which information and materials contained therein are compiled or collected solely for federal purposes.

ARGUMENT

1) Washington Law Requires That Motor Vehicle Accident Reports Be Prepared And That Information And Materials From These Reports Be Collected And Analyzed For State Purposes, And Further Provides That Some Of This Information Is Discoverable In Tort Litigation.

In forwarding its interpretation of 23 U.S.C. §409 and supporting its constitutionality, Pierce County and amici curiae State of Washington et al. assert that the only reason accident history and accident reports are gathered by Washington State is in furtherance of federal highway safety programs such as 23 U.S.C. §152. At one point Pierce County argues "data such as police accident reports contain the information required by state regulations, and those regulations were enacted in *express compliance with the federal highway safety act*. *See e.g.* WAC §136-28-010." Pet. Br. at 34; *see also id.* at 46. Washington State et al. amici, in criticizing the Washington State Supreme Court's

interpretation of §409, contend that states only collect accident data for federal purposes:

> The holding of the Washington Supreme Court rests on its assumption that accident materials and raw data were originally prepared for 'routine state and local purposes'. This assumption is wrong. Accident materials and raw data were not collected for routine state and local purposes. They were collected to comply with federal requirements in the highway safety program.

Washington State et al. Amicus Br. at 19 (citation omitted). These amici further assert that "[b]efore the Highway Safety Act of 1966, state accident reports were not related to highway safety but were used for a variety of non-highway uses, such as financial responsibility." *Id.*[2]

In response to these assertions, this brief first establishes that, since at least 1937, the type of accident history and accident reports sought in this case have been required to be gathered under Washington State law, for highway safety and other purposes, independent of any §152 mandate. Moreover, under Washington law, some of this information is generally available to tort litigants.

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[2] Pierce County and two amici also make a related argument. They assert that, because federal highway safety program statutes and regulations require participating states to collect certain accident history information and encourage the use of uniform accident report forms, all state data and reports must be deemed compiled or collected for §152 purposes. *See* Pet. Br. at 43; Washington State et al. Amicus Br. at 19-20; Louisiana State Amicus Br. at 14-17. This argument is addressed *infra*, §§2 & 3.

Curiously, in their characterization of Washington State law, Pierce County and Washington State et al. amici overlook longstanding state statutory law requiring that accident history and accident reports be compiled and collected for state purposes. They make no reference to that portion of the Washington Supreme Court's opinion below that recognizes this statutory scheme in upholding generally the discoverability under state law of certain accident history and accident reports required by Washington law. *See Guillen*, 31 P.3d at 637-40 & ns. 7-8 (upholding discovery of particular information and materials requested under civil discovery rules and state public records act).

Washington law has long required written accident reports to be filed for any motor vehicle collision resulting in injury or death, or causing property damage in excess of a minimum amount, currently seven hundred dollars. RCW 46.52.030, .070; WAC 446-85-010. Parties to the accident must file a report, unless one is made by a law enforcement officer. RCW 46.52.030. This same statute requires that the accident report form be devised by the chief of the Washington State Patrol (WSP), and that the form:

> shall call for sufficiently detailed information to disclose all material facts with reference to the accident to be reported thereon, including the location, the circumstances, the conditions then existing, the persons and vehicles involved, the insurance information required under RCW 46.30.030, personal injury or death, if any, the amounts of property damage claimed, the total number of vehicles involved, whether the vehicles were legally parked, legally standing, or moving, and whether such vehicles were occupied at the time of the accident.

Id. at (4). The original of the report is either filed with or forwarded to the chief of the WSP. RCW 46.52.030(2).[3] As determined by the Supreme Court below, while these accident reports are not admissible in evidence, *see* RCW 46.52.080, they are discoverable under Washington's civil discovery rules. *Guillen* at 640.

Accident forms filed by law enforcement officers investigating accidents are required to be prepared "in the same manner as required of the parties to such accident and as fully as the facts in his possession concerning such accident will permit." RCW 46.52.070(1). As a result, these reports partake of the same information required to be provided by parties to an accident.

Under RCW 46.52.060 it is the responsibility of the chief of the WSP to take the accident reports submitted pursuant to state law and file, tabulate and analyze them for the purpose of generating data based thereon "showing

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[3] RCW 46.52.030(1) requires that the accident report be directed to "the chief of police of the city or town if such accident occurred within an incorporated city or town or the county sheriff or state patrol if such accident occurred outside incorporated cities and towns." Under this statute accident reports for accidents in unincorporated areas of Pierce County would be directed to the WSP or county sheriff. Pierce County appears to argue that it is significant that there is no state requirement that *it* compile and collect motor vehicle accident history. Pet. Br. at 38 n.4. Under the proposed interpretation of §409 in this brief this fact is not determinative. If a Pierce County agency has obtained accident history or accident reports compiled or collected for non-§152 purposes, such information and materials remain outside of §409's protection, even in that agency's hands. *See infra*, §2.

the number of accidents, the location, the frequency and circumstances thereof, and other statistical information which may prove of assistance in determining the cause of vehicular accidents." RCW 46.52.060. The full text of this statute provides:

> It shall be the duty of the chief of the Washington state patrol to file, tabulate, and analyze all accident reports and to publish annually, immediately following the close of each fiscal year, and monthly during the course of the year, statistical information based thereon showing the number of accidents, the location, the frequency and circumstances thereof and other statistical information which may prove of assistance in determining the cause of vehicular accidents.
>
> Such accident reports and analysis of reports thereof shall be available to the director of licensing, the department of transportation, the utilities and transportation commission, the traffic safety commission, and other public entities authorized by the chief of the Washington state patrol, or their duly authorized representatives, for further tabulation and analysis for pertinent data relating to the regulation of highway traffic, highway construction, vehicle operators and all other purposes, and to publish information so derived as may be deemed of publication value.

Id.

In *Guillen*, the Washington Supreme Court held that, while under the second paragraph of this statute the full published reports may not be available to the public generally, litigants are entitled to obtain, under state law, the raw data consisting of " 'the number of accidents' at the location in question, the 'frequency,' and the 'circumstances

thereof,' " referenced in the first paragraph of RCW 46.52.060. *Guillen* at 639 n.8.

This state statutory scheme regarding accident reports long predates the federal statutes involved in this case, particularly §152, enacted in 1973. *See generally* Pub. L. No. 93-87, 87 Stat. 282 (Highway Safety Act of 1973). The substance of the referenced state statutes has remained essentially the same since at least 1937. *See* Washington Motor Vehicle Act, Wash. Laws 1937, ch. 189, §§133-40. This longstanding state statutory scheme provides for the compilation and collection of accident history information and accident reports solely for state purposes. The text of RCW 46.52.060 suggests that those state purposes include, but are not limited to, improving highway safety. (Other state purposes include civil and criminal law enforcement, and, more recently, ensuring the financial responsibility of drivers.) Significantly, there is no indication in Ch. 46.52 RCW that its requirements are traceable to state recordkeeping obligations imposed by federal law. However, there are regulations incorporating Ch. 46.52 RCW that implement a system of purely intrastate cooperation, designed to achieve uniformity in local traffic ordinances. *See* Ch. 308-330 WAC; *see also* RCW 46.90.005-.010 (enabling legislation for Ch. 308-330 WAC).[4]

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[4] Washington State et al. amici assert, without citation, that while the WSP formerly maintained the accident database required under the 1966 Federal Highway Safety Act, this function has been transferred to the Washington State Department of Transportation. *See* Washington State et al. Amicus Br. at 21 & n.7. If the database referred to is the one maintained pursuant to RCW 46.52.060, this has been required by state law since 1937. Wash. Laws 1937, ch. 189, §138.

Nor do the state administrative regulations relied upon by Pierce County and Washington State et al. amici support the notion that the accident-related information and materials gathered pursuant to Ch. 46.52 RCW are collected for federal purposes. *See* WAC 136-28-010 – 030 (reproduced in Pet. Br. at App. 4a-5a); *see also* RCW 36.78.070 (enabling provision for these regulations). These regulations do not purport to convert the state purposes reflected in this statutory scheme to federal purposes. Instead, they generally require county engineers to avail themselves of state work product and enhance or embroider upon it in furtherance of the cooperation required of Washington as a participant in federal highway safety programs. *See e.g.* 23 U.S.C. §152(a) (requiring states to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, [etc.]"). Similarly, state statutes assenting to the purposes, provisions, terms and conditions of federal highway programs do not purport to otherwise convert the accident reporting system set forth in Ch. 46.52 RCW to federal purposes such as those set forth in 23 U.S.C. §152. *See* RCW 47.04.050-.080 (accepting federal highway safety program support and committing the state to act in a manner consistent with federal law).[5]

[5] Given the level of detail of information available as a result of accident-related recordkeeping required by Washington law, it is difficult to accept the argument of Washington State et al. amici that compliance with federal highway safety program requirements such as §152 has in any meaningful way expanded state tort liability. *See* Washington State et al. Amicus Br. at 15-18. The information and materials generated for state purposes under Ch. 46.52 RCW alone provide considerable background about the accident history of any particular collision site. Even if the accident report forms now used are

(Continued on following page)

Accident history and accident reports in Washington State are not compiled or collected solely for purposes of compliance with federal highway safety programs. As discussed below, the existence of independent state purposes for gathering such information and materials places them outside the limited scope of §409.

2) §409 Provides A Narrow Privilege Confined To Eliminating The "Silver Platter" Effect As To Information And Materials Compiled Or Collected Solely For Federal Purposes Pursuant To Federal Law.

In construing §409, the Court must favor the narrowest possible construction of the text. This is true not only under the doctrine of constitutional avoidance, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), but also because §409 amounts to an evidentiary privilege. As a privilege, §409 stands "in derogation of the search for truth," and must be narrowly construed to encompass only the legitimate purposes it is designed to achieve. *See United States v. Nixon*, 418 U.S. 683, 710 (1974). Moreover, §409 will not be found to preempt areas within the traditional province of the states unless this is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, ___, 122 S.Ct. 999, 1006, 152 L.Ed.2d 27, 38 (2002) (invoking "clear statement principle of statutory construction"). Strict construction serves "the

designed to comport with federal highway safety program directives, this does not provide any new specie of tort liability in Washington.

interest of avoiding unintended encroachment on the authority of the States." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993).

The text and purpose of §409 readily support a narrower interpretation than that given by the Washington Supreme Court majority and urged by Pierce County. The statute provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. §409.

This language includes several significant limitations. Initially, the protection it affords applies only in an action for damages arising out of an occurrence at a location referenced in protected information and materials. *See* Washington State et al. Amicus Br. at 22. Further, in the context of this case, such information and materials are specifically limited to (1) "reports, surveys, schedules, lists, or data" that are (2) "compiled or collected," (3) "for the purpose of" safety enhancement, (4) "pursuant to [23

U.S.C. §152]."[6] Specific materials referenced in §409, *viz.* "reports," "surveys," "schedules," and "data," are the same as those identified in §§130, 144, and 152, suggesting the information and materials protected under §409 are only those relating to federal highway safety program requirements. *See Southern Pac. Transp. Co. v. Yarnell*, 890 P.2d 611, 614 (Az. 1995) (noting these are "words of art" limiting scope of §409 to information and materials generated pursuant to federal programs); *accord Dept. of Transp. v. Superior Court (Tate)*, 55 Cal. Rptr.2d 2, 5 n.6 (Cal. App. 1996).

The "purpose" and "pursuant to" requirements of §409 significantly restrict the reach of the statute. These terms make clear that information and materials, the compilation or collection of which cannot be traced to the specific purposes identified in §409, fall outside the scope of its protection. Several lower courts addressing these requirements have correctly observed that §409 does not protect information and materials compiled or collected *for other purposes*, such as for law enforcement purposes pursuant to state law. *See Yarnell* at 612-13; *Kitts v. Norfolk & Western Ry. Co.*, 152 F.R.D. 78, 81-82 (S.D.W.Va. 1993); *Irion v. State*, 760 So.2d 1220, 1226 (La. App.), *writ denied*, 773 So.2d 727 (La. 2000). As the court in *Kitts* explained:

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[6] The first purpose set forth in §409 also references §130 (pertaining to railway-highway crossings) and §144 (pertaining to public highway bridges). A second purpose, *developing* any highway safety construction improvement project, is also mentioned, apparently to pick up compilations or collections relating to potential projects. Because these aspects of §409 are not at issue in this case, this brief refers only to the statutory purpose relating to §152.

> "There are, quite clearly, documents and records which have been created by the N&W long before safety enhancement and the provisions of section 409 were a 'gleam in the eye' of Congress, and such documents and reports would continue to be generated . . . . Had Congress contemplated that such reports and information were to be thrown into the safety enhancement pot and accorded protection, it could have spoken to the matter in section 409."

152 F.R.D. at 81-2.

§409's "purpose" and "pursuant to" requirements confirm that Congress did not contemplate that all information and materials concerning roadway hazards would be "thrown into the safety enhancement pot." *Id.* at 82. Rather, the language Congress chose in §409 recognizes the reality that information about roads and accidents has long been compiled and collected by states for other purposes, albeit not in the comprehensive, uniform fashion encouraged under the federal highway safety programs. *See e.g.* 23 U.S.C. §402(k) (conditioning federal funding on state implementation of uniform computerized recordkeeping system).[7] The independent information gathering and reporting activity that, at least in Washington, predates

[7] §402(k)(1) provides a limited privilege for any "report, list, schedule, or survey . . . prepared by or for a State or political subdivision thereof under this subsection," which subsection provides funding for development of a "comprehensive computerized safety recordkeeping system." This privilege does not purport to protect information and materials in the computer system itself, only the work product prepared based on the computerized data. Nor does §409 protect all information and materials in this computer system. As discussed in the main text, only those compiled or collected solely for §152 purposes are protected.

the 1966 Federal Highway Safety Act and serves other purposes, remains unaffected by §409. It involves information and materials that historically have been available and will likely continue to exist without regard to state participation in federal highway safety programs. *See supra*, §1; *cf. Irion* at 1226 (noting "[h]istorically, accident reports have been collected by the [Louisiana] Department of Public Safety for many other purposes.")

Given the limitations in the language of §409, this statute's application must be confined only to information and materials that would not be available but for state participation in federal highway safety programs. *See e.g. Palacios v. Louisiana & Delta R.R. Inc.*, 740 So.2d 95, 100-01 (La. 1999) (noting testimony that state transportation department would not have information requested "but for" activity under federal railroad safety assessment program); *see also* United States Br. at 32 n.24 (urging application of §409 to information or documents held by a transferee that "would not have existed but for . . . Section 152-related purposes"); Product Liability Advisory Council Amicus Br. at 9 (suggesting data sought by respondents would not exist "but for" federal highway safety program).

In other words, §409 applies only to information and materials that are compiled or collected *solely* for the specified federal purposes. It is not enough for a state to show that otherwise existing state information and materials "eventually become ingredients thrown into a soup kettle with a distinct flavor of safety enhancement." *Kitts* at 81. Instead, because they would exist without the overlay of the federal scheme, they remain discoverable or admissible, as determined by state law.

This narrow view of §409 properly puts the burden on the party asserting the privilege to prove its applicability. *See Tate* at 856. In particular, a state (or subdivision) must show which information or material requested by a plaintiff has been compiled or collected solely pursuant to §152. If it were sufficient that a federal purpose be *one of the reasons* for the compilation or collection of particular data, then, as some courts have suggested, §409 would have no limits. *See e.g. Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 & n.3 (8th Cir. 1992); *Lusby v. Union Pac. R.R.*, 4 F.3d 639, 641 (8th Cir. 1993); *Mackie v. Grand Trunk Western R. Co.*, 544 N.W.2d 709, 711 (Mich. App. 1996). Under this view, a state (or subdivision) may argue that, at least in part, it collects and compiles all roadway information in order to participate in federal highway safety programs. *See* Pet. Br. at 34 (citing WAC 136-28-010); Louisiana State Amicus Br. at 14-17 (arguing that standardized form for accident reports shows information is collected in part for federal purposes); Assoc. of Am. R.R. Amicus Br. at 29-30 (arguing accident reports and railroad files, etc., otherwise compiled or collected for state or operational purposes, fall within §409 as to entities that also gather them in part for purposes of federal programs). Looking to the particular *manner or method* used in compiling or collecting information and materials elevates form over substance. The *purpose* for compiling and collecting information and materials must govern whether they are a product of participation in federal highway safety programs, and thus subject to the §409 privilege.

To the extent particular information – such as coding or "spotting" on a report form – exists solely for purposes

of complying with uniform methods of information gathering under Title 23, this specific information may be privileged under §409, and subject to redaction from otherwise discoverable or admissible documents. *See* Louisiana State Amicus Br. at 14-15 (explaining "spotting"). This is so because the coded information would not exist but for §152 activity. Trial courts applying §409 must closely examine assertions of the privilege to assure that the only information and materials protected are those: (1) "compiled" for §152 purposes in the reports, surveys, schedules, etc. required under this section, or (2) "collected" for such purposes when not ultimately contained in such compilations.

This narrow application of §409 prevents a plaintiff from gaining the benefit of what Pierce County calls "one stop shopping." *See* Pet. Br. at 42. Similarly, under this view, a state will not be forced to turn over a neatly arranged "silver platter" of evidence. At the same time, this approach avoids the misuse of §409 to shelter data and records that are compiled or collected for non-§152 purposes, simply because this is done in the uniform manner encouraged under federal law.

A related issue concerns whether information and materials that are compiled or collected for dual purposes, both federal and non-federal, are subject to protection under §409 depending on which agency or source a tort plaintiff targets in discovery. Under the view of the Washington Supreme Court concurrence, also advanced by the United States here, information and materials gathered pursuant to state law may be available from the source that initially generated them for non-§152 purposes, but not from the agency that later compiled or collected them

for §152 purposes. *See Guillen* at 656-59 (Madsen, J., concurring); United States Br. at 30-36.

This "source-based" distinction featured prominently in the briefing before the Washington Supreme Court, which largely contemplated two discrete levels of information gathering and reporting – the first compiled or collected by law enforcement agencies pursuant to state law and the second by public works or transportation departments pursuant to §152.[8] However, the *Guillen* majority legitimately questions the workability or desirability of drawing a distinction based on the entity from whom discovery is sought, in light of advancing technologies and efficiencies in recordkeeping. *See* 31 P.3d at 646. Further, the United States posits the situation in which a single electronic database may be used concurrently for state and federal purposes. *See* United States Br. at §II.B.

The problems that may arise in any source-based application of §409 are answered by the "purpose-based" approach advanced here. §409 speaks to information and materials compiled or collected for specific purposes, without regard to their source or location. It should not matter whether a plaintiff seeks discovery from the local sheriff or from the state public works or transportation department. If the information and materials sought were

[8] WSTLA Foundation's amicus curiae brief in the Washington Supreme Court was most consistent with the interpretation of §409 reflected in the *Guillen* concurrence. The Foundation's view of the statute has since evolved largely in recognition of the *Guillen* majority's observation and the United States' argument here, both of which suggest that any source-based analysis of §409 results in undue expansion of the privilege beyond Congress' intent.

not compiled or collected solely for §152 purposes, no entity can assert a privilege over them. Further complications that may arise if all information and materials are contained in a single electronic database are addressed *infra*, §3.

This narrow view of the scope of §409 best comports with its limited purpose. Based on the clear language and context of the statute, it is universally understood as having been designed to encourage candor by states in gathering and reporting information required for participation in federal highway safety programs, by preventing such information from later being used to a state's disadvantage in tort ligitation. *See e.g. Coniker v. New York*, 695 N.Y.S.2d 492, 494-95 (N.Y. Ct. Cl. 1999) (and cases cited therein); *Palacios*, 740 So.2d at 98. Simply put, Congress sought in §409 "merely to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work, tool for direct use in private litigation." *Light v. State of New York*, 560 N.Y.S. 2d 962, 965 (N.Y. Ct. Cl. 1990).

Under this view, §409 is in the nature of a "work product" privilege. To the extent Congress anticipated certain work product as part of information gathering and reporting under §152, and the implementation of federally funded safety enhancement projects, it protected the confidentiality of that work product by enacting §409. Otherwise, states would be faced with the unenviable choice of not participating in federal highway safety programs or handing over to litigants a "silver platter" of potentially damaging evidence.

§409's intent is thus to neutralize any litigation *disadvantage* to the states, not to create what Pierce

County seeks here – a strategic *advantage* that could amount to a practical immunity from tort liability. *See Yarnell* at 614-15 (noting §409 promotes "integrity of the federal regulatory scheme without compromising the integrity of the parallel state tort system"); *Tardy v. Norfolk S. Corp.*, 659 N.E.2d 817, 820 (Oh. App. 1995) (observing, "[i]f all accidents are reported and no evidence of prior reported accidents is admissible, a plaintiff could never meet the burden of proof under [Ohio tort law] – an anomalous result.")

Limiting §409 to information and materials that would not exist but for a state's participation in federal highway safety programs is also consistent with this Court's observation, in the related context of the Federal Railroad Safety Act, that federal funding requirements were not intended generally to supersede substantive state tort law. *See Easterwood* at 667-68 (noting regulations under 23 CFR pt. 924 are not preemptive as to state negligence law); *Norfolk So. R. Co. v. Shanklin*, 529 U.S. 344, 352-55 (2000) (finding preemption only as to regulations setting forth federal "standard of adequacy" for railroad warning devices, displacing state standards). Indeed, this Court observed in *Easterwood* that state negligence law and federal law may complement each other. *See Easterwood* at 668 (stating in response to argument that federal regulation is inconsistent with state common law, "the scheme of negligence liability could just as easily complement these regulations. . . . ")

In rejecting a narrow interpretation of §409, the Washington Supreme Court majority relied upon the 1995 amendment to the statute, which added the phrase "or collected" following the word "compiled." *See* Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N.

(109 Stat.) 568.[9] The majority viewed this amendment as signaling an intended "change" in the scope of §409, in response to judicial decisions, including *Wiedeman v. Dixie Elec. Mem. Corp.*, 627 So.2d 170 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994), *Yarnell* and *Kitts*, *supra*. *See Guillen*, 31 P.3d at 642-44. Drawing a line of distinction between pre-1995 and post-1995 cases, it interpreted the 1995 amendment and accompanying legislative history as rejecting the view, set forth above, that §409 only covers information and materials gathered *solely* for the purpose of federal safety enhancement, pursuant to §152. *See id.* at 643-44 & n.21.

This view of the 1995 amendment is incorrect. With and without the words "or collected," courts have engaged in the same struggle over the proper scope of §409. *Compare Isbell v. State*, 9 P.3d 322 (Az. 2000) (adhering to *Yarnell* view after 1995 amendment, and holding documents compiled or collected under authority of state law not subject to §409 privilege), and *Robertson* at 1435 & n.3 (rejecting view that pre-1995 version of §409 protected only materials compiled "solely for federal funding projects.").

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[9] In conjunction with this amendment, Congress stated:

> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data.

H.R. Rep. 104-246 §328, at 59 (1995).

The 1995 amendment answered only the particular view, represented by *Wiedeman*, that underlying factual data collected but not ultimately embodied in a §152-generated document, remains discoverable and admissible in evidence. *See* 627 So.2d at 173. The legislative intent note accompanying the amendment makes clear that such "raw data" collected *pursuant to §152* is equally protected under §409, regardless of whether it is ultimately embodied in any "formal or bound" federal submission. *See* H.R. Rep. 104-246 §328, at 59 (1995); *see also Reichert v. Dept. of Transp.*, 694 So.2d 193, 197-98 (La. 1997) (recognizing this effect of 1995 amendment).

While the 1995 amendment *clarified* the scope of §409, it did not expand its reach. It relates only to the categories of information and materials otherwise covered by §409 – "reports, surveys, schedules, lists, and data," collected for the purposes outlined in the statute. The requirement remains that the *purposes* for which information and materials are compiled or collected be federal. Raw data, no less than documents, reports or the like, which are compiled or collected for *other non-federal purposes*, remain outside §409's limited scope after the 1995 amendment.

Setting aside the 1995 amendment language, Pierce County and supporting amici also suggest that the word "compiled" must be broadly construed to include information and materials originally compiled for state purposes, when later compiled for federal purposes. *See* Pet. Br. at 12-13 n.3, 39-40; Louisiana State Amicus Br. at 20-22; AAR Amicus Br. at 28-29. This argument relies on comparison of §409 with Exemption 7 to the Freedom of Information Act (FOIA), 5 U.S.C. §552. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). The two

statutes are not comparable. A broad reading of §409 implicates fundamental federalism concerns, an issue not involved in the interpretation of FOIA Exemption 7 in *John Doe Agency*. Moreover, it is not enough to say that the word "compiled" generally includes matter "originally compiled" for other purposes. *See id.* at 154-55. Consistent with §409's limited purpose of neutralizing an otherwise apparent disadvantage to states participating in federal highway safety programs, in this context the privilege applies only to documents and data compiled *solely* for the specified statutory purposes.[10]

This Court should adopt a narrow construction of §409. The purpose-based construction advanced here is fully supported by the text of the statute and consistent with the congressional goal of fostering uninhibited information gathering and reporting pursuant to §152, while creating neither an advantage nor disadvantage to states in civil litigation.

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[10] Further, the legislative history accompanying the 1995 amendment suggests that use of "compiled" in §409 denotes only material contained in a "formal or bound report," because Congress found it necessary to add the words "or collected" to pick up raw data not so contained. *See supra*, n.9. This provides an additional reason for not relying on the textual analysis in *John Doe Agency* in interpreting the word "compiled" in §409. As explained in the main text, the words "or collected" do not otherwise broaden the scope of §409; the significant "purpose" requirement remains.

3) The Black Hole Specter: The Co-Mingling Of §152 Information And Materials With Those Gathered For Non-§152 Purposes In A Single Electronic Database Should Not Insulate Non-§152 Information And Materials From Discovery Under §409.

The narrow purpose-based analysis of §409 set forth above is distinct from the source-based analysis reflected in the *Guillen* concurrence, and the view of the United States before this Court. A purpose-based analysis avoids the specter of state agencies creating a "legal black hole" by dropping non-§152 information and materials into §152 work product files, thereby rendering all records subject to the privilege. *See Guillen*, 31 P.3d at 644. This purpose-based analysis also addresses the problem, recognized by the Washington Supreme Court and the United States, of applying §409 in the face of a single electronic database that is the only source of information and materials regarding accident history. *Id.* at 646-47; United States Br. at 36-39.

The *Guillen* majority's concern about a single electronic database may have been resolved in its opinion by limiting the §409 privilege to information and materials originally compiled for §152 purposes, and declaring the 1995 "or collected" amendment to §409 unconstitutional. *See* 31 P.3d at 655. On the other hand, the United States' source-based analysis ultimately leads it to conclude that the §409 privilege would apply to *all* information and materials contained in a single electronic database, whether or not generated solely for §152 purposes. United States Br. at 38-39. This is so because "the basic reasons for the very existence of such computer-based data storage

systems include facilitating applications for hazard improvement funds under Section 152." *Id.* at 37.[11]

It is unclear whether this case involves a single electronic database. *See* Pet. Br. at 1-3; Washington State et al. Amicus Br. at 19-21. In any event, the Court should reject the sweeping application of the §409 privilege under such circumstances. This approach makes the accessibility of information and materials originally generated for non-§152 purposes rise or fall according to the manner of recordkeeping. Nothing in §409 or its scant legislative history suggests the methodology for compiling or collecting information and materials should dictate the scope of the privilege.

Moreover, under the United States' proposed application of §409, the complete loss of access to non-§152 information and materials will leave tort victims in a worse position than had §409 not been adopted, a result it otherwise rejects as inconsistent with the statute. *See* United States Br. at 33-34; *see also Guillen*, 31 P.3d at 655 (describing motor vehicle accident history as "essential to the proper adjudication of claims brought under state and local law.") Non-§152 information and materials essential to proving viable tort claims – otherwise beyond the scope

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[11] However unlikely, the equivalent of the single electronic database could also exist in the paper world, if a formal or bound §152 report becomes the exclusive source of information and materials, whether compiled or collected for §152 purposes or for other purposes. It is unclear whether the United States would similarly argue the entire work product would be deemed for §152 purposes in this instance, given no federal program (*e.g.* statute comparable to 23 U.S.C. §402(k)) encouraging states to consolidate all records in formal or bound reports.

of §409 – will be brought within the privilege. This will effectively provide an immunity not expressly granted by Congress, and not available under state law, in those states like Washington that permit tort claims of this nature against governmental entities. Under the United States' view, from a purely tactical standpoint, a state like Washington would be remiss if it did not convert its recordkeeping system to a single electronic database, so that it could take full advantage of the §409 privilege.

There is no indication that Congress intended the §409 privilege to create such a legal black hole. Instead, when information is contained in a single electronic database, the protection of §409 should only apply to §152-generated information and materials or the particular enhancement of or embroidery upon non-§152 information and materials undertaken solely for §152 purposes. *See supra*, §2.

The United States does not suggest that segregating information and materials based upon whether compiled or collected for §152 purposes is impossible in an electronic world. Moreover, that this requires a fact-specific application of §409 does not render the privilege unworkable or impractical. Trial courts are accustomed to resolving disputes among litigants as to the precise scope of an asserted privilege.

CONCLUSION

The Court should adopt the narrow reading of §409 proposed in this brief and resolve this case in a manner consistent with such reading.

Respectfully submitted,

DEBRA L. STEPHENS*
6210 E. Lincoln Lane
Spokane, WA 99217
(509) 465-5702

GREGG L. TINKER
101 Stewart St., Ste. 1010
Seattle, WA 98101
(206) 447-9640

**Counsel Of Record*

GARY N. BLOOM
P.O. Box 1461
Spokane, WA 99210
(509) 624-4727

BRYAN P. HARNETIAUX
517 E. 17th Ave.
Spokane, WA 99203
(509) 624-3890

Dated: August 9, 2002.